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No. 325

In the Supreme Court of the United States

OCTOBER TERM, 1942

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 1–8) and dissenting (R. 9–17) opinions in the circuit court of appeals are reported at 130 F. (2d) 514.

JURISDICTION

The judgment of the circuit court of appeals was entered August 3, 1942 (Tr. 65[1]). The peti-

[1] The reference "Tr." is to the stenographic transcript which accompanied the petition for a writ of certiorari. The Court granted petitioner's motion for leave to proceed *in*

tion for a writ of certiorari was filed August 21, 1942 and was granted October 12, 1942 (R. 17–18). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a person who enters a bank with intent to commit an offense against the financial condition of the bank which is felonious under state law but not under federal law is guilty of entering with intent to commit "any felony or larceny" within the meaning of the Bank Robbery Act.[2]

STATUTE INVOLVED

Section 2 (a) of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749 (12 U. S. C. 588b (a)), commonly called the Bank Robbery Act, reads as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloni-

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forma pauperis (R. 17) and only the opinions in the court below are contained in the printed portion of the transcript of record. References to this portion of the record are indicated by the letter "R.".

[2] This question is also presented in *Tornello* v. *Hudspeth*, No. 163, now pending on a motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, in which the Government has filed a memorandum opposing the granting of the petition.

ously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank;* or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control,

* Defined in Section 1 of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by Section 333 of the Act of August 23, 1935, c. 614, 49 Stat. 684, 720 (12 U. S. C. 588a), as including "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, as amended [*i. e.*, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation]."

management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioner was indicted under Section 2 (a) of the Bank Robbery Act, as amended (*supra*, p. 2), for entering the Howard National Bank and Trust Company of Rutland, Vermont, a national bank and a member of the Federal Reserve System, with intent to utter a forged promissory note and thereby to defraud the bank (Tr. 2, 5–6). To utter a forged promissory note is a felony under the law of Vermont.* Petitioner was convicted after trial before a jury (Tr. 32), and he was sentenced to imprisonment for one year and a day (Tr. 33).

On appeal the court below affirmed the conviction (Tr. 65), holding that the words "any felony" in the second clause of Section 2 (a) of the Bank Robbery Act penalizing entering a bank

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*Section 8485 of the Public Laws of Vermont (1933) provides: "A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section [including a promissory note or any endorsement or assignment of a note], knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars." Section 8750 provides: "Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

with intent to commit "any felony or larceny," include offenses which are felonious under state law (R. 1–8). Circuit Judge Frank dissented; he was of the opinion that the words should be limited to offenses which are felonies under federal law and affect the banks covered by the statute (R. 9–17).[1]

SUMMARY OF ARGUMENT

The language of Section 2 (a) in its natural meaning plainly interdicts the conduct charged in the indictment. Without limitation it prohibits entering a bank "with intent to commit . . . any felony." The all-embracing words "any felony" indicate a deliberate purpose to exclude the very contention which petitioner now makes.

In enacting the Bank Robbery Act the prime purpose of Congress was to protect banks in which the Federal Government has an interest. From this point of view any distinction between entries with intent to commit federal felonies and entries with intent to commit state felonies was quite irrelevant, and to impose such a limitation by construction would defeat the broad remedial purpose of the Act. The clause now in question was added to the Bank Robbery Act in 1937, upon

[1] Since petitioner does not question the sufficiency of the evidence to support the conviction, it is unnecessary to delineate the proof adduced at the trial. The evidence, however, is summarized in the opinion of the circuit court of appeals (R. 1–2).

the recommendation of the Attorney General, for the express purpose of including "within its prohibitions, the crimes of burglary and larceny of a bank * * *." Petitioner's construction would partially defeat this specific purpose, for many felonies against a bank, which one might break into the bank to commit, are not independent offenses under federal law.

It was also the purpose to build upon state law and to complement but not supersede state law enforcement. This pattern had been developed in many statutes enacted contemporaneously with the Bank Robbery Act. There was therefore no reason to distinguish in the definition of burglary between state and federal felonies in order to avoid superseding state law enforcement activities. On the contrary, the pattern required avoidance of any such demarcation.

The Act was drafted against a background of common law and state statutory definitions of crime. Hence it is probable that Congress used the classic phrase "with intent to commit * * * any felony" with its common significance. This inference is confirmed by the legislative history. The original burglary section proposed by the Attorney General in 1934 expressly proscribed breaking into a bank with intent to commit any felony, state or federal. The burglary clause recommended by the Attorney General in 1937 to remedy the defect created by the failure of Congress to enact a burglary clause in 1934 would have proscribed

entering "with intent to commit * * * any larceny or other depredation", a definition under which it would plainly have been irrelevant whether the depredation was independently punishable under state or federal law. Congress amended this draft to substitute "with intent to commit * * * any felony or larceny." The classic purpose of requiring proof of an intent to commit a felony in burglary prosecutions is to distinguish burglary from unlawful entries which were lesser crimes. Consequently, Congress must be assumed to have used the classic words "any felony" rather than the unfamiliar phrase "any depredation" in order to limit the burglary clause of the statute to entries with intent to commit serious offenses. There is no reason to suppose that Congress intended for the first time without comment to use the words for the unfamiliar purpose of importing a distinction between state and federal offenses.

ARGUMENT

A PERSON WHO ENTERS A BANK WITH INTENT TO COMMIT AN OFFENSE AGAINST THE FINANCIAL CONDITION OF THE BANK WHICH IS FELONIOUS UNDER STATE LAW IS GUILTY OF ENTERING WITH INTENT TO COMMIT "ANY FELONY OR LARCENY" WITHIN THE MEANING OF THE BANK ROBBERY ACT

Petitioner's sole contention is that he did not "enter any bank * * * with intent to commit * * * any felony or larceny" within the meaning of Section 2 (a) of the Bank Robbery Act,

because the felony which he intended to commit is a felony by state law only and not by federal law. He advances two alternative interpretations of that clause. The first is that "any felony" refers only to the other felonies, robbery and grand larceny, interdicted by Section 2 (a). This interpretation was approved by Judge Huxman in his dissenting opinion in *Hudspeth* v. *Tornello*, 128 F. (2d) 172 (C. C. A. 10), now pending on petition for a writ of certiorari as No. 163, this Term. The second interpretation suggested by petitioner is that the phrase refers to those felonies under federal statutes which affect the banks covered by the Act. This second interpretation was approved by Judge Frank in his dissenting opinion in the court below (R. 164).

The Circuit Court of Appeals for the Tenth Circuit and the court below have both rejected the contention made by petitioner and have held that the words "any felony" include offenses under the law of the state in which the bank is located. The two courts have differed somewhat, however, in interpreting the Act. In *Hudspeth* v. *Melville*, 127 F. (2d) 373 (C. C. A. 10), and *Hudspeth* v. *Tornello*, *supra*, the Circuit Court of Appeals for the Tenth Circuit limited the scope of the phrase "any felony" to "acts committed in a national bank and having relation to the protection, preservation and efficiency of such bank, which constitute a felony under the laws of the state in which the bank is situated" (127 F. (2d),

at 376). The court below apparently went further and interpreted the phrase to cover all felonies, state and federal, whether or not directed against the bank (R. 8).

We submit that both courts were correct in rejecting the two restrictive interpretations urged by petitioner. Since petitioner intended to defraud the bank by uttering a forged note, there is no occasion to decide whether entries with intent to commit other state felonies not affecting the financial condition of a bank are also included.[6]

1. The plain meaning of the words prevents restricting Section 2 (a) to federal felonies

When taken according to its ordinary and natural meaning, the language of the second clause of Section 2 (a) plainly interdicts the act charged in the indictment. The second clause without limitation prohibits entering a bank "with intent to commit in such bank * * * *any* felony or larceny".[7] The words do not suggest that Congress, which was concerned with the protection of banks in which the federal government has an interest, considered it material whether the felony

[6] There can be no doubt of the power of Congress to enact appropriate legislation to punish state felonies affecting the financial condition of banking institutions organized or operating under the laws of the United States. *Westfall* v. *United States*, 274 U. S. 256; *Doherty* v. *United States*, 94 F. (2d) 495 (C. C. A. 8), certiorari denied, 303 U. S. 658; cf. *United States* v. *Walter*, 263 U. S. 15.

[7] Italics supplied.

was proscribed by state law or by federal. Indeed, the use of the all-embracing words "*any* felony" indicates a deliberate purpose to exclude the very contention which petitioner makes. Cf. *United States* v. *Corbett*, 215 U. S. 233, 241. There was good precedent for such usage. The words "any felony" had been used for the purpose of describing both state and federal felonies in state statutes dealing with such matters as punishment of habitual criminals,[8] disbarment of attorneys,[9] and fitness to hold public office.[10]

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[8] *E. g.*, *Arnold* v. *State*, 127 Tex. Cr. 89, 94 (1934). See, also, *State* v. *Merriweather*, 136 Kan. 337, 339 (1932).

[9] *In re O'Connell*, 184 Cal. 584 (1920); *In re Kerl*, 32 Idaho 737, 741–742 (1920); *In re Minner*, 133 Kan. 789, 790–793 (1931); *Commonwealth* v. *Porter*, 242 Ky. 561, 563 (1932); *In re Conley*, 188 Minn. 575, 576 (1933); *In re Peters*, 73 Mont. 284, 287 (1925); *State ex rel. Sorensen* v. *Seaville*, 123 Neb. 457, 459 (1932); *Matter of Ackerson*, 218 App. Div. (N. Y.) 388, 390–392 (1926); *In re Kirby*, 10 S. D. 322, 328 (1897); *In re Finch*, 156 Wash. 609 (1930). Contra: *In the Matter of Ebbs*, 150 N. C. 44, 46–51 (1908) (see, however, the dissenting opinions of Brown, J., and Clark, C. J., at pp. 58–62); cf. *Ex Parte Biggs*, 52 Ore. 433, 436 (1908), holding that the felony need not be one under the laws of Oregon, but it must be known to Oregon law.

[10] E. g., *State ex rel. Anderson* v. *Foysek*, 91 Mont. 448, 454–455 (1932). Compare *Seitz* v. *State Medical Board*, 24 Ohio App. 154, 158–159 (1926), holding that, under a statute providing for the revocation of a physician's certificate for conviction of "a felony", the word includes a violation of the federal narcotic laws. And in *State ex rel. Beckman* v. *Bowman*, 38 Ohio App. 237, 240–242 (1930), the court held that, under a provision establishing pensions for policemen who, after having served fifteen consecutive years, are discharged

2. The purpose and pattern of the Bank Robbery Act, as reflected in its legislative history, show that Congress used the words "any felony" in their natural meaning to comprehend both state and federal felonies.

Prior to 1934, robbery, larceny, burglary, and other cognate offenses directed against banks organized or operating under federal law were punishable only under state law. Federal law protected such banks merely against embezzlement and kindred offenses by officers, directors, agents, and employees (R. S. § 5209, as amended by the Act of September 26, 1918, c. 177, § 7, 40 Stat. 972; 12 U. S. C. 592). In 1933 other offenses against banks reached such proportions as to give rise to requests from all sections of the country for federal protection against gangsters operating from one state to another, a situation with which local authorities were frequently unable to cope.[11]

In 1934, in response to this situation, the Attorney General recommended a bill (S. 2841, 73d Cong., 2d sess.) to create a number of new federal offenses.[12] Section 1 defined the term "bank" as

"for any offense other than * * * being convicted of a felony", the word "felony" embraced the federal felony of conspiracy.

[11] See H. Rep. 1461, p. 2, and S. Rep. No. 537, 73d Cong., 2d sess.

[12] The text of the bill as passed by the Senate (78 Cong. Rec. 5738) did not differ materially from the Attorney General's draft. The Senate bill is copied in Appendix "A", pp. 39-40, *infra*.

including banks organized or operating under federal law, and member banks of the Federal Reserve System. Section 2 made it a felony to take or attempt to take money or property belonging to or in the possession of a bank, either without its consent or with its consent when such consent was induced by fraud. Section 3 penalized breaking into or attempting to break into a bank with intent to commit "any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank is located. Section 4 (a) prohibited the forcible taking or attempted taking, from the person or presence of another, of any money or property belonging to or in the possession of a bank, and subsection (b) provided an increased penalty if, in the commission of the offense, any person should be assaulted or placed in jeopardy of his life by the use of a dangerous weapon. Section 5 imposed a minimum penalty of ten years' imprisonment and a maximum penalty of death upon any one who, in committing any offense defined in the bill, or in seeking to avoid apprehension, or attempting to escape after arrest, should kill or kidnap any person. The sixth and last section provided that jurisdiction over offenses defined by the bill should "not be reserved exclusively to courts of the United States."

Although this bill was modified in Congress (see pp. 17–18, *infra*), it is important to emphasize its

purpose and pattern; for in our view they have brought about the evolution of the Act into its present form and show the restricted interpretations advocated by the petitioner to be contrary to the intention of Congress.

First. The prime purpose was to extend federal protection to banks theretofore protected only by state laws. From this point of view any distinction between state and federal felonies was entirely irrelevant. Thus, in proscribing breaking into a bank with intent to commit a felony, there was no reason to distinguish between an intent to commit a felony under state law and an intent to commit a federal felony. In either case there was an offense against the bank, and a need and occasion for federal intervention. Consequently, the Attorney General's draft interdicted breaking into a bank building "with intent to commit * * * any offense defined by this act or any felony under any law of the United States or under any law of the State * * * where such building is located".

Second: It was also the purpose to build upon state law and to complement state enforcement, rather than to create a series of novel crimes coming under the exclusive jurisdiction of the federal government. In recommending the bill the Attorney General explained (H. Rep. No. 1461, 73d Cong., 2d sess., p. 2):

> There is no intention that the Federal Government shall supersede the state authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals.

And Section 6 (Section 4 as finally enacted) provided that "Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States" (48 Stat. 783; 12 U. S. C. 588d).

This being the pattern of the bill, there was no reason to limit the offenses created so as to avoid superseding state law enforcement activities. On the contrary, the pattern required avoiding any demarcation between state and federal crimes in order that the authorities might carry on joint investigations and prosecute in either state or federal courts regardless of the details of the crime committed, thus avoiding the chance that criminals would escape through gaps or conflicts between state and federal power. Sections 2, 3, 4 and 5 of the Attorney General's draft reflected the plan in the definitions of the crimes, especially Section 3 which, as we have shown, expressly interdicted burglary of a bank regardless of whether the intended felony was state or federal.

Other federal criminal laws enacted during the same period also emphasize the fact that those in charge of the federal program of law enforcement had formulated a pattern of complement-

ing state law."[12] The legislation was built upon state law and used the fact that the person or goods entered into commerce as the occasion for the exercise of federal power to supplement state authority. It was natural, therefore, in the Bank Robbery Act to use the fact that the state offense was against a bank in which the federal government had an

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[12] National Stolen Property Act, 18 U. S. C. 415:

"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen * * *, knowing the same to have been so stolen * * * shall be punished * * *."

National Cattle Theft Act, Pub. No. 217, 77th Cong., 1st sess. (August 18, 1941), Sec. 3:

"Whoever shall transport * * * in interstate or foreign commerce any cattle, knowing the same to have been stolen, shall be punished * * *."

Fugitive Felon Act, 18 U. S. C. 408e:

"It shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory, or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, under the laws of the place from which he flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged. * * *"

Liquor Enforcement Act of 1936, 27 U. S. C. 223 (a):

"Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales * * * of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited * * * shall * * * be guilty * * *."

Connally Act, 15 U. S. C. 715b:

"The shipment or transportation in interstate commerce from any State of contraband oil [defined as 'petroleum

interest as the occasion for the exercise of federal power. And it is unlikely that one building upon this pattern would draw a distinction between entry into a bank with intent to commit a federal felony and entry with intent to commit a state felony.

Third. It is significant that the bill was drafted with common law and state offenses in mind. This appears clearly in the definitions of larceny,

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which * * * was produced * * * in excess of the amounts permitted to be produced * * * under the laws of a State * * *"] produced in such State is hereby prohibited. * * *"

Federal Firearms Act, 15 U. S. C. 902 (e), 902 (g):

902 (e). "It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence [defined as 'murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year'] or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

902 (g). "It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen."

See also National Motor Vehicle Theft Act of 1919, 18 U. S. C. 408:

"* * * Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished * * * *"

In *Abraham* v. *United States*, 15 F. (2d) 911, 912 (C. C. A. 8), reference was made to the law of the state to determine whether the vehicle had been "stolen."

burglary, robbery, kidnapping and murder. In case of doubt, therefore, the common law background of such phrases as "with intent to commit * * * any felony" furnishes a better guide to the proper interpretation of the statute than any distinction between state crimes and federal.

The bill drafted by the Attorney General did not become law. It passed the Senate without material change,[14] but the House Judiciary Committee struck out Section 2, punishing larceny, and Section 3, punishing burglary, and the bill was finally enacted without those sections.[15] The legislative history throws no light upon the rea-

[14] The bill recommended by the Attorney General was introduced in the Senate on February 21, 1934 (78 Cong. Rec. 2946), was reported favorably by the Judiciary Committee without material amendment (S. Rep. No. 537, 73d Cong., 2d sess.), and passed the Senate without debate (78 Cong. Rec. 5738).

[15] The House Judiciary Committee, without explanation, struck out Sections 2 and 3 and renumbered Sections 4, 5, and 6 as Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess., p. 1). It also recommended an amendment making the death penalty provided by Section 5 of the Senate bill discretionary with the jury (*ibid*). The bill as thus amended passed the House after only meager discussion which sheds no light on the reasons for the committee's action (78 Cong. Rec. 8132–8133). The Senate disagreed to the House amendments and requested a conference (*id.*, 8264). The House agreed to a conference but insisted on its amendments (*id.*, 8322). The committee of conference recommended that the House amendments stand (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8776), and the bill was finally enacted in that form (78 Cong. Rec. 8775, 8776, 8778, 8856, 8857). The bill became the Act of May 18, 1934, c. 304, 48 Stat. 783.

sons for the changes but it has been suggested that they were made to confine the bill to situations in which the need to supplement local law enforcement had become imperative." But even though this objection prevented the Attorney General's draft from becoming law, we submit that the original draft and its principal features are very significant in interpreting the 1937 amendment, for that amendment was made pursuant to the same purposes and pattern that were embodied in the original draft after experience had shown that the limitations imposed by the House committee were unwise.

Between 1934 and 1937 experience proved that the elimination of the larceny and burglary sections had been unfortunate. On March 17, 1937, Attorney General Cummings submitted to the Speaker of the House a draft of a bill to amend Section 2 (a) of the 1934 act (the robbery provision) so as to include within its prohibitions the crimes of burglary and larceny. In his letter of transmittal, the Attorney General explained the purpose of the proposed amendment as follows (H. Rep. No. 732, 75th Cong., 1st sess., Appendix "B" pp. 42–43, *infra*):

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[1] In *1 Law and Contemporary Problems* (1934) 445, 448–449, the objections to Sections 2 and 3 of the Senate bill were attributed to Representative Sumners, the chairman of the House Judiciary Committee, who, it is said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative."

> The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results.
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> The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 • • • so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

The amendment proposed to punish—

> • • • whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, *any larceny or other depredation;* or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, • • •. [Italics supplied.]

Just as the prime purpose of the bill originally recommended by the Attorney General was to give banks federal protection against offenses already punishable under state law, so the specific purpose of the amendment was to add the protection against larceny and burglary, already generally punishable under state law, which Congress had previously withheld. The letter of transmittal makes this plain. But to have defined burglary to exclude entries with intent to commit offenses

not punished by federal law would have partially frustrated this purpose because many of the offenses which one might enter a bank to commit still were not punished by federal law. Doubtless it was for this reason that the proposed amendment proscribed entry with intent to commit "any larceny or other depredation," a definition under which it would have been obviously irrelevant whether the depredation was already unlawful under federal law or had been condemned by the states alone.[17]

There was no change in the pattern of the legislation between 1934 and 1937.[18] The policy of the federal government apparently continued to be one of building upon state law in order to aid and complement the states in the prevention of crime. Consequently, there was the same reason not to distinguish between state and federal felonies in the proposed 1937 amendment that had existed in 1934 (see pp. 13–16, *supra*).

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[17] In the court below Judge Frank found the failure of the Attorney General to use the express words of his original bill to be significant, saying that the original draft contained the "obvious verbiage" if the intention was to negative any distinction between state and federal offenses (R. 10–11). But since the Attorney General in his draft plainly accomplished that purpose in other words, it seems apparent that the explanation lies in the fact that the Attorney General's draft was modeled upon Section 192 of the Criminal Code (see p. 21, *infra*).

[18] The only intervening amendment was one expanding the definition of "bank" as used in the Act to include banks insured by the Federal Deposit Insurance Corporation. See Act of August 23, 1935, c. 614, Sec. 333, 49 Stat. 684, 720.

In one respect, however, the amendment proposed by the Attorney General in 1937 did depart from the scheme of the original bill. In defining the offense of burglary the 1937 amendment did not follow the common law. The draftsman apparently took as his model Section 192 of the Criminal Code, 18 U. S. C. 315, which provides:

> Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined * * *.

In the draft amendment of the Bank Robbery Act, he substituted the word "enter" in lieu of "forcibly break into", but otherwise he followed Section 192. This change was in line with modern definitions of burglary,[19] and establishes that the amendment was designed to cover any entry of a bank with the prescribed intent and not merely breaking and entering. *Alford* v. *United States*,

[19] "In many of the states, statutes have been passed declaring it to be burglary for a person to break into other places than a dwelling house, as for instance into warehouses, shops, railroad cars, offices, mills, barns, stables, vessels and tents. Similarly by statute in a number of states, the necessity for a breaking has been eliminated and entry alone is now sufficient, in such states, if the required intent be also present. Again in some states burglary may be committed in the daytime as well as at night, and with intent merely to commit a misdemeanor. * * *" Miller, *Criminal Law* (1934), p. 339.

113 F. (2d) 885, 887 (C. C. A. 10). But since the words "any larceny or other depredation" were retained, the change would also have had the effect of punishing as burglaries many trivial offenses which, under common law and state law, were only petty misdemeanors. It may be doubted whether the draftsman so intended but, whatever the purpose, it certainly did not make the distinction which petitioner advocates. (See p. 20, *supra*.)

It seems entirely clear, therefore, that the amendment drafted by the Attorney General followed the purposes and pattern of his original proposal and, like it, contained no distinction between state offenses and federal. Consequently, petitioner's contention must rest upon a showing that the changes made by Congress imported this distinction into the 1937 amendment for the first time and that Congress thereby abandoned the pattern upon which the entire program had been formulated. There is no suggestion of this purpose in the legislative history and, we submit, examination of the changes made by Congress shows the argument to be untenable.

The amendment recommended by the Attorney General was introduced in the House by Representative Summers (H. R. 5900, 75th Cong., 1st sess., 81 Cong. Rec. 2731) and was referred to the Committee on the Judiciary. That committee amended the clause defining burglary so that the critical phrase would read "any felony or lar-

ceny" instead of "any larceny or other depredation" (H. Rep. No. 732, 75th Cong., 1st sess.; Appendix "B", *infra*, p. 41, 43–44). No other changes were made in committee. An amendment to the larceny provision was subsequently offered on the floor of the House to distinguish between grand and petit larceny (81 Cong. Rec. 5376–5377; see also *id.*, 4656). Both amendments were adopted and, as thus amended, the bill passed the House (*id.*, 5377). In the Senate the Judiciary Committee merely adopted the House Committee's report (S. Rep. No. 1259, 75th Cong., 1st sess.) and the bill was passed without further change (81 Cong. Rec. 9331).[20]

The reason for changing the phrase "any larceny or other depredation" to "any felony or larceny" does not appear in either the committee reports or the Congressional Record. In support of his restrictive interpretation Judge Frank seems to have thought that the change was made in consequence of Representative Summers' opposition to unnecessary extension of federal power, which had caused the elimination of the larceny and burglary sections in 1934. But since the temper of the times had changed in those three years, and since it is plain that Representative Summers accepted the great part of the larceny provision, there is no reason to suppose that he sought to restrict the burglary provision to entries to com-

[20] Act of August 24, 1937, c. 747, 50 Stat. 749.

mit federal felonies. A more reasonable explanation is that the proposed draft was too harsh in punishing as burglary a peaceable entry with intent to commit any "depredation" (see pp. 20–22, *supra*) and that for this reason the House committee modified it by substituting a familiar modern definition of burglary. It is true that it nowhere appears expressly that this objection was made to the burglary clause of the Attorney General's draft, but it is significant that a similar objection was made to the larceny clause on the floor and that the committee readily proposed an amendment which was accepted. Moreover, the committee probably realized that the word "depredation" lacks any established meaning, and wished to avoid difficulties in interpretation by the use of the classic and more familiar definition of burglary as entering with intent to commit a felony. Both of these explanations are consistent with the purposes and pattern which had governed the evolution of the Act. Petitioner's explanation on the other hand would result in their partial abandonment.

First. It is plain that the prime purpose of the amendment as it was enacted was the same as that of the Attorney General in recommending it—to protect banks against larceny and burglary, thus furthering the aims of the original statute. The title of the amendatory Act was "An Act to amend the bank-robbery statute to include burg-

lary and larceny" (50 Stat. 749). The House and Senate Reports also show the same purpose (see Appendix "B", pp. 41–44, *infra*). Since the purpose of Congress and the Attorney General were the same, it is unlikely that Congress, without comment, changed the Attorney General's draft of the burglary clause in order to make the distinction between state and federal offenses which he had rejected as irrelevant.

Such a distinction, moreover, would have prevented fulfillment of the purpose to punish burglary of banks. Banks in which the federal government had an interest were (with a narrow exception [21]) protected by federal law only against robbery as defined in the 1934 Bank Robbery Act, and other common crimes against them were not covered at all by federal statutes. To have written the burglary clause to include only entries with intent to commit federal felonies therefore would have limited it narrowly. For example, if that had been done, the crime of entering a bank with intent to commit a non-federal felony such as arson, which is clearly within the purview of the common law definition of burglary,[22] would not have been punishable under the statute. In view of the prime purpose to afford banks adequate protection and the announced intention to interdict any burglary of a bank, Congress, in dealing with

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[21] See p. 11, *supra*.

[22] Miller, *Criminal Law* (1934), pp. 323, 337–339.

burglary, must have used the comprehensive words "any felony," to include not merely the offenses of robbery and larceny defined in the other clauses of Section 2 (a), but also all other offenses against banks which are felonies under the laws of the states.

Furthermore, to have used the words "any felony" to include only federal felonies would have reduced the burglary clause to a mere prohibition against attempts to commit robbery or larceny, for under that construction the clause would in practical effect have no application unless the entry was accompanied by an intent to rob or steal. Since the Act already contained an express provision in the first clause of Section 2 (a) making attempted robbery an offense, Congress cannot have intended to restrict the wholly independent second clause to that purpose.

Second. Since the 1937 amendment did not expressly change the pattern of building upon state law and cooperating with state officials, there is no reason to suppose that Congress silently abandoned it, contrary to its established policy (see pp. 13–16, *supra*). Yet petitioner's contention can be upheld only by that conclusion, for the burglary clause as he construes it would not complement state law, but would dissociate federal law from it.

Third. As part of the pattern of building upon state offenses, the original bill defined crimes

according to the familiar common law and state statutory definitions (see pp. 16–17, *supra*). And it is significant that the House Committee changed the Attorney General's draft of the 1937 amendment to cast it in such terms. Thus, Section 2 (a) as amended proscribes in sequence, robbery, burglary, grand larceny and petit larceny. The definitions of robbery and larceny contained in the statute embody, respectively, the common law concepts of a forcible taking and a taking and carrying away with intent to steal.[23] In the case of burglary, Congress followed the state trend and departed from the common law requirement of a breaking and entering in the night-time,[24] but it retained in the definition of the offense the classic element of entry with intent to commit a felony.[25]

In this context, the classic phrase "with intent to commit * * * any felony" must be accorded its common significance. The requirement in common law and state statutory definitions of burglary that the entry be *with intent to commit a felony* was concerned with grades of offenses, distinguishing burglary from unlawful entries which were lesser crimes. In specifying such an intent in this Act, drawn as it was to operate as

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[23] Miller, *op. cit. supra*, pp. 340–341, 362–367, 391, 392–395. See *Alford* v. *United States*, 113 F. (2d) 885, 887 (C. C. A. 10).

[24] Miller, *op. cit. supra*, 329–334, 337.

[25] *Id.*, pp. 337–339.

a complement to state law, Congress must be taken to have used that phrase for its customary purpose, thus excluding from the coverage of the burglary provision petty offenses which would have been punishable as burglaries in the draft submitted by the Attorney General) see p. 24, *supra*).[26] Nor was there reason to use a requirement of intent to commit a federal felony in order to determine whether the burglary should be punishable by the federal government and the state or by the state alone. The offense against the bank, and therefore against the federal government, would be complete with the actual or attempted entry. In the case of a forcible entry this would be admitted, we think; and the rule must be the same where the entry is peaceable.

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[26] It is to be noted, however, that the majority below was in error when it stated that the phrase "any felony or larceny" was substituted for "any larceny or other depredation" on the floor of the House in order to meet an objection that the bill, as reported by the committee, placed simple larceny on the same plane as robbery and breaking and entering (R. 4–5). As we have pointed out (*supra*, pp. 22–23), the substitution referred to was made by the committee. The objection raised on the House floor, which the majority below referred to, was directed at the fact that the bill, as reported, made all larcenies felonious, and was the occasion for the amendment, which the House adopted, distinguishing between grand and petit larceny (see *supra*, p. 23). The error, however, does not affect the validity of the majority's suggestion for the two changes parallel each other in excluding from punishment as felonies many petty offenses included in the draft amendment recommended by the Attorney General.

For these reasons we submit that the words "any felony" must be read in their natural meaning to include any felony, whether state or federal. The limitation which petitioner would write into the Act would frustrate, at least in part, the broad purpose to protect banks and the specific purpose to punish burglaries against them. It assumes that Congress abandoned in this one clause, without explanation, the deliberate pattern of building upon state law which had pervaded all consideration of this Act and many companion statutes. Finally, it disregards the common law and state statutory background of the phrase "with intent to commit * * * any felony," as well as its context, and imports a novel distinction between intent to commit a state felony and intent to commit a federal felony, in spite of the fact that every previous draft of the burglary provision negatived any such limitation.

Moreover, the various considerations advanced by Judge Huxman and Judge Frank in their dissenting opinions dealing with the present issue seem to us upon analysis to be unpersuasive. Since they do not form any single argument, we deal *seriatim* with the points which we have not previously discussed.

1. Both Judge Huxman and Judge Frank thought that Congress referred only to federal felonies when it used the words "any felony," because it had defined a felony in Section 335 of

the Criminal Code, 18 U. S. C. 541.[27] We submit that this argument is based on a misconception of the nature and purpose of the section relied on. As the majority below said (R. 7–8), the "so-called definition" of "felony" in Section 335 is not a definition in any real sense. It merely sets up a statutory classification of federal offenses as felonies or misdemeanors according to the severity of the punishment.[28] This classification is chiefly useful in applying certain statutes specifying a different procedure for felony trials as distinguished from trials for misdemeanors, which show by their context that reference to Sec-

[27] This section provides: "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: * * *"

[28] That this was the purpose of Section 335 is apparent from the report of the Special Joint Committee on the Revision of the Laws which drafted the Criminal Code. Referring to Section 335, the Committee said (S. Rep. No. 10, Part 1, 60th Cong., 1st sess., pp. 12–13):

"Certain features have been embodied in the bill reported that characterize the whole system rather than pertain to any particular part of it. These are—

"First. The omission from the various sections of the law of the designation of the respective offenses therein denounced, as felonies or as misdemeanors, and the insertion of a general provision establishing this *classification*.

* * * * * *

"Felony as it existed at common law was distinguished as an offense carrying with it forfeiture of land and goods as a part of the punishment. This qualifying distinction disappears altogether from our criminal jurisprudence with the abolition of fines and forfeitures. It remains to-day only as

tion 335) is intended.[29] But Section 335 does not purport to define the word "felony" wherever it appears in federal statutes and should not be used for that purpose.

2. In the court below Judge Frank disapproved the majority's interpretation of the Act on the ground that it led to such "awkward" and "irrational" results as to punish an entry with intent to commit forgery (R. 13) or murder (R. 14) although there would be no federal crime if the intent were formed after the entry. But both these objections, we submit, are nothing but a suggestion that Congress might have gone further in creating federal offenses. They do not show that Congress, despite its expressions of that purpose, did not intend to punish all unlawful entries with felonious intent. And it was natural to draw the line at unlawful entries without including all offenses against banks, even though other offenses might have been included.

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a term intended to designate 'infamous crimes' and as having some relation to certain features of *criminal procedure*. An examination of our existing statutes will reveal the fact that it is indiscriminately applied, being often affixed to an offense of lesser magnitude than others that are designated as misdemeanors, and has thus become misleading and frequently harmful by its indefinite *classification*.

"* * * Your committee has drawn the distinction between felonies and misdemeanors as follows:

"'All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors.'" [Italics supplied.]

[29] E. g., Judicial Code, Section 287, 28 U. S. C. 424.

Another "awkwardness" alleged to result from the majority's interpretation is that, under that interpretation, entry of a bank with intent to commit a state felony such as rape or adultery—crimes which bear no relation to the protection of banks or the currency—is made a federal offense (R. 14). It may be observed that this "awkwardness" does not suggest the necessity of distinguishing between state and federal felonies for, as the majority opinion pointed out (R. 7), there are felonies under federal law whose punishment under this Act would seem equally incongruous; the argument, therefore, goes only to show that perhaps "any felony" is meant to include only offenses against a bank. No such question, however, is present in the instant case; affirmance of the judgment below does not necessitate that the clause be interpreted to embrace *all* state felonies, irrespective of whether they affect the welfare of national banks. The state felony which the indictment charged petitioner with intent to commit—uttering a promissory note bearing a forged indorsement—was unquestionably one which affects the financial condition of a bank.[20]

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[20] The dissenting judge also argued that the majority's interpretation does not effectuate the congressional purpose to make bank burglary a federal crime since, under that interpretation, no one can properly be indicted for burglary, "but only for entering or attempting to enter a bank with the intent to commit burglary" (R. 13). We do not understand the argument. While this clause of the statute, as we

3. It may be assumed, as was pointed out by Judge Huxman in his dissent in *Hudspeth* v. *Tornello*, 128 F. (2d) 172, 173, that under the majority opinion the law will not give the same protection to banking institutions in different states, and that the statute may vary from state to state in its application. But this would not render the Act unconstitutional. In *Franklin* v. *United States*, 216 U. S. 559, 568–569, this Court sustained the validity of Section 2 of the Act of July 7, 1898, c. 576, 30 Stat. 717 (subsequently Section 289 of the Criminal Code), which made applicable to any place over which the United States had jurisdiction the criminal laws and punishments of the state in which such place was situated.[11] And in *United States* v. *Classic*, 313 U. S. 299, it was held that where, under the law of the state, the primary election is an integral

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have shown (*supra*, p. 21), and as the dissenting judge concedes (R. 10), clearly embraces more than burglary in the strict sense, it is clear that it is the *entry* with intent to commit a felony in the bank which constitutes the burglary.

[11] In rejecting the contention that this statute was an unconstitutional delegation to the states of authority to change the criminal laws applicable to places within the jurisdiction of the United States, the Court pointed out that the statute expressly limited the state criminal laws which were adopted by reference to those existing at the time of its enactment. We do not construe this to mean that the absence of such an express limitation from a statute of Congress adopting state laws would be fatal to the statute. In the earlier case of *United States* v. *Paul*, 6 Pet. 141, 142, cited in the *Franklin*

part of the procedure of choosing representatives in Congress, interferences with the right of qualified persons to vote in such an election and to have their votes counted are embraced within the prohibitions of Sections 19 and 20 of the Criminal Code. Neither is the variation in application a reason to suppose that Congress did not intend to proscribe entry with intent to commit a state felony. As we have pointed out (pp. 14–15, *supra*), there are many other federal penal statutes under which reference to the laws of the states is or may be necessary in order to determine their applicability.

4. The legislative history of the 1937 amendment refutes the view adopted by Judge Huxman in the *Tornello* case (128 F. (2d), at 173) that the words "any felony or larceny" mean any felony

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case, this Court held that the effect of a statute similar to the one involved in the *Franklin* case, but which contained no limiting clause, was "limited to the laws of the several states in force at the time of its enactment." Moreover, there is, we think, a distinction between the type of statute considered in the *Franklin* case and that involved in the instant one. In the former, Congress directly adopted state penal laws as the laws of the United States, while under the latter reference is merely made to state law to determine whether a federal offense has been committed. The instant statute is similar in this respect to numerous other federal statutes to which reference has already been made (*supra*, p. 14, n. 13), the application of each of which is dependent in some degree upon the provisions of state law. See also *United States* v. *Classic*, 313 U. S. 299, 310–311, 318–319. In any event, the

or petit larceny as defined in Section 2 (a).[32] When the House Judiciary Committee amended the Attorney General's draft of the proposed amendment to Section 2 (a) by substituting the words "any felony or larceny" for "any larceny or other depredation," the bill made no distinction between grand and petit larceny. (See Appendix "B", *infra*, pp. 41, 43–44.) Under the committee's draft of the bill larceny of any money or

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question is not present in the instant case, because the uttering of a forged promissory note was a felony under Vermont law at the time of the enactment of the amendment in 1937 making entry of a bank with intent to commit any felony a federal offense. See p. 4, n. 4, *supra*.

[32] Judge Huxman thought that only by construing the words "any felony or larceny" to mean "any of the felonies or petit larceny as herein [i. e., Section 2(a)] defined," could the requirement that criminal laws must have general application be met or the congressional intent to protect the currency be effected (128 F. (2d), at 173). However, Judge Huxman was somewhat inconsistent in his interpretation, for in his dissent in the earlier case of *Hudspeth* v. *Melville*, 127 F. (2d) 373, 377–378, he construed the term "felony" to mean *any* federal felony against a national bank or the currency.

At one point in his dissenting opinion below Judge Frank seemingly concurred in the view adopted by Judge Huxman in the *Tornello* case; he reasoned that the provisions added by the 1937 amendment of Section 2(a)—one making larceny of property exceeding $50 in value a felony and larceny of property not exceeding $50 in value a misdemeanor, and the other punishing entering or attempting to enter a bank with intent to commit any felony or larceny—"nicely correlate," the first change making stealing from a bank either a federal felony or federal petit larceny, and the second making it a

property from a bank, regardless of value, was made punishable by imprisonment for not more than twenty years, and was therefore a felony. The distinction making larceny of money or property exceeding $50 in value a felony and larceny of money or property having a lesser value a misdemeanor was made on the floor of the House (p. 23, *supra*). Hence, the committee could not have intended the word "larceny" to have the significance which Judge Huxman attached to it. On the contrary, since the committee's draft had made any larceny a felony, there was no need for the committee to include the word "larceny" at all if, by the words "any felony" it had reference only to the federal felonies defined in Section 2 (a).

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federal crime to enter or attempt to enter a bank with intent to commit "such a federal felony or federal larceny" (R. 10). This construction is not, however, the one finally adopted by Judge Frank; in his view the proper construction is the one which Judge Huxman first adopted in the *Melville* case, i. e., that the words "any felony" mean *any* federal felony against a national bank (R. 10, 14).

Moreover, it is only reasonable to suppose that if the committee meant to refer only to the felonies defined in the section, it would have made specific reference to them. Compare Sections 2 (b) and 3 of the statute (48 Stat. 783) where, in defining aggravated degrees of the offenses listed in Section 2 (a), Congress made direct reference to them as "any offense defined in subsection (a) of this section" (Sec. 2 (b)) and "any offense defined in this Act" (Sec. 3).

5. The principle that statutes creating crimes must be strictly construed in favor of the accused has no application here. While a penal statute may not be extended to cases which are not fairly embraced within its terms, the rule does not forbid giving the words of the statute the meaning which harmonizes best with the language and context and promotes to the fullest extent the legislative policy. *United States* v. *Lacher*, 134 U. S. 624, 628, 629. As this Court said recently in *United States* v. *Raynor*, 302 U. S. 540, 552:

> * * * No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress. * * *

See also *United States* v. *Gilliland*, 312 U. S. 86, 93; *United States* v. *Giles*, 300 U. S. 41, 48–49; *Donnelley* v. *United States*, 276 U. S. 505, 512; *Fasulo* v. *United States*, 272 U. S. 620, 628; *United States* v. *Corbett*, 215 U. S. 233, 242. We submit that for the reasons stated our interpretation gives the statute the meaning which harmonizes with its language and context and effectuates the legislative policy, and that therefore no narrower construction is required.

CONCLUSION

It is respectfully submitted that petitioner was properly convicted and that the judgment below should be affirmed.

CHARLES FAHY,
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WENDELL BERGE,
Assistant Attorney General.
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ARCHIBALD COX,
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Attorneys.

January 1943

~~NOVEMBER 1942~~.

APPENDIX "A"

The 1934 Bank Robbery Bill as it passed the Senate provided as follows (78 Cong. Rec. 5738):

Be it enacted, etc., That as used in this act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

Sec. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

Sec. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or

part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both.

Sec. 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than 5 years nor more than 25 years, or both.

Sec. 5. Whoever, in committing any offense defined in sections 1, 2, or 3 of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death.

Sec. 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to courts of the United States.

APPENDIX "B"

75th Congress, 1st Session } HOUSE OF REPRESENTATIVES { Report No. 732

AMEND THE BANK-ROBBERY STATUTE TO INCLUDE BURGLARY AND LARCENY

APRIL 30, 1937.—Referred to the House Calendar and ordered to be printed

Mr. HEALEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5900]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5900) to amend the bank-robbery statute to include burglary and larceny, after consideration, report the same favorably to the House with an amendment with the recommendation that, as so amended, the bill do pass.

The committee amendment is as follows:

Page 2, line 2, after the word "any" insert "felony or", and after the word "larceny" strike out "or other depredation."

The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute, enacted in 1934, (48 Stat. 783; U. S. C.,

title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. These are national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance Corporation. Your committee concurs in this recommendation.

There is attached hereto and made a part of this report the following communication from the Attorney General to the Speaker of the House in which he explains the desirability of the proposed amendment.

"OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 17, 1937.

Hon. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives,
Washington, D. C.

MY DEAR MR. SPEAKER: The act of May 18, 1934 (48 Stat. 783; U. S. C. title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the

employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General."

In compliance with clause 2a of rule XIII there is printed below existing law in roman with new matter proposed to be inserted printed in italics:

"(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or*

part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

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SUPREME COURT OF THE UNITED STATES.

No. 325.—October Term, 1942.

Jerome Parker Jerome, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Sec. 2(a) of the Bank Robbery Act (48 Stat. 783, 50 Stat. 749, 12 U. S. C. § 588b) provides in part that "whoever shall enter or attempt to enter any bank,[1] or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both". Petitioner was indicted under that section for entering a national bank in Vermont with intent to utter a forged promissory note and thereby to defraud the bank. He was convicted after trial before a jury and was sentenced to imprisonment for one year and a day. The utterance of a forged promissory note is a felony under the laws of Vermont (P. L. 1933, § 8485, § 8750) but not under any federal statute. The Circuit Court of Appeals affirmed the conviction by a divided vote, holding that "felony" as used in § 2(a) includes offenses which are felonies under state law. 130 F. 2d 514. We granted the petition for a writ of certiorari because of the importance of the problem in the administration of justice and because of the diversity of views which have developed as respects the meaning of "felony" in § 2(a). Compare with the decision below *Hudspeth* v. *Melville*, 127 F. 2d 373; *Hudspeth* v. *Tornello*, 128 F. 2d 172.

Prior to 1934 banks organized or operating under federal law were protected against embezzlement and like offenses by R. S.

[1] The term "bank" is defined in § 1 of the Act (12 U. S. C. § 588a) to include "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of Section 12B, of the Federal Reserve Act, as amended."

5209, 40 Stat. 972, 12 U. S. C. § 592. But such crimes as robbery, burglary, and larceny[2] directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters against bank activities with which local authorities were frequently unable to cope. H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General in response to that concern recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong., 2d Sess. And see 78 Cong. Rec. 5738. Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit "any offense defined by this Act, or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained "by any trick, artifice, fraud, or false or fraudulent representation." This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out § 2, dealing with larceny, and § 3, dealing with burglary. H. Rep. No. 1461, *supra*, p. 1. And the bill was finally enacted without them. But it retained the robbery provision[3] now contained in the first clause of § 2(a) of the Bank Robbery Act.

In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced "some incongruous results"—a "striking instance" of which was the case of a man who stole a large sum from a bank but, who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.*, pp. 1-2. The bill as introduced (H. R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to § 2 (a) two new clauses—one defining larceny and the other making it a federal offense

[2] To the extent that acts constituting larceny would not also constitute a federal crime under R. S. 5209. See United States v. Northway, 120 U. S. 327, 335.

[3] "Whoever, by force and violence, or by putting in fear, feloniously takes or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

to enter or attempt to enter any bank with intent to commit therein "any larceny or other depredation". For reasons not disclosed in the legislative history, the House Judiciary Committee substituted "any felony or larceny" for "any larceny or other depredation". H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause[4] distinguishing between grand and petit larceny (81 Cong. Rec. 5376-5377), § 2(a) was enacted in its present form.

We disagree with the Circuit Court of Appeals. We do not think that "felony" as used in § 2(a) incorporates state law.

At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas* v. *Willcuts*, 296 U. S. 1; *Helvering* v. *Stuart*, 317 U. S. —, and cases cited. But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States* v. *Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. Since there is no common law offense against the United States (*United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Gradwell*, 243 U. S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not

[4] ". . . wherever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See *United States* v. *Lanza*, 260 U. S. 377; *Hebert* v. *Louisiana*, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

There is no plain indication in the legislative history of § 2(a) that Congress used "felony" in a sense sufficiently broad to include state offenses. Though the legislative data are meager, the indications are to the contrary. In the first place, the 1934 bill expressly provided, as we have noted, that state felonies were included in the definition of the new federal offense of burglary. That provision was stricken in the House. The 1934 bill also defined larceny to include larceny by trick or fraud. That provision was likewise eliminated in the House. The 1934 Act was passed without either of them. The 1937 bill did not renew the earlier proposals to include them but substituted "any larceny or other depredation". Larceny, like robbery, is defined in § 2(a). And "depredation" is not devoid of meaning in such a setting (cf. *Deal* v. *United States*, 274 U. S. 277, 283) apart from any special significance which it may have in local law. It is difficult to conclude in the face of this history that Congress having rejected in 1934 an express provision making state felonies federal offenses reversed itself in 1937 and through the phrase "any felony or larceny" adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress through the same clause adopted by indirection in 1937 much of the fraud provision which it rejected in 1934. Cf. *United States* v. *Patton*, 120 F. 2d 73.

In the second place, Congress defined in § 2(a) robbery, burglary, and larceny but not felony. We can hardly believe that having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense. In this connection it should be noted that when Congress has desired to incorporate state laws in other federal penal statutes, it has done so by specific reference or adoption.[5] The omission of any such

[5] See *e. g.*, Act of March 4, 1909, 35 Stat. 1137, 49 Stat. 380, 18 U. S. C. § 392; Act of May 18, 1934, 48 Stat. 782, 18 U. S. C. § 408e; Act of June 11, 1932, 47 Stat. 301, 18 U. S. C. § 420a; Act of February 22, 1935, 49 Stat. 21, 15 U. S. C. § 715b; Act of June 25, 1936, 49 Stat. 1928, 27 U. S. C. § 223.

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provision in this Act is a strong indication that it had no such purpose here. Cf. *United States* v. *Coppersmith*, 4 Fed. 198, 207. The Act extends protection to hundreds of banks located in every state. If state laws are incorporated in § 2(a), Congress has gone far toward putting these banks on a basis somewhat equivalent to "lands reserved or acquired for the use of the United States" as described in § 272 of the Criminal Code, 18 U. S. C. § 451. In such a case all violations of penal laws of the state within which the lands are located become federal offenses. Criminal Code § 289, 18 U. S. C. § 468. Such an expansion of federal criminal jurisdiction should hardly be left to implication and conjecture.

Moreover, the difficulty of giving "felony" in § 2(a) a state law meaning is emphasized when we turn to the law of such a state as New Jersey. There we find crimes classified as "misdemeanors" and "high misdemeanors". Rev. Stat. (1937) § 2:103-5, § 2:103-6. *See United States* v. *Slufzky*, 79 F. 2d 504, 505. Uttering a promissory note with a forged endorsement is a "high misdemeanor". Rev. Stat. (1937) § 2:132-1b. The inference is strong that if Congress had designed § 2(a) to include the more serious state offenses committed in or against national or insured banks or only such state offenses as affected those banks (*Hudspeth* v. *Melville*, *supra*, p. 376), it would have used language which would have afforded that protection in all the states.

Finally, the inclusion of state crimes in the word "felony" neither comports with the scheme of the Act nor is necessary to give the Act meaning and vitality. As we have noted, the purpose of the 1934 Act was to supplement local law enforcement in certain respects. And the 1937 amendments were designed "to include larceny and burglary of the banks protected by this statute." H. Rep. No. 732, *supra*, p. 1. But there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws covering all sorts of felonies. On the contrary the bill introduced in 1937 was much more selective and revealed no purpose to make a comprehensive classification of all crimes against the banks. Moreover, the run of state felonies—forgery, rape, adultery, and the like—would seem to have little or no relevancy to the need for protection of banks against the wholesale activities of the gangsters of that day. A related objection could of course be made if "felony" as used

in § 2(a) were taken to mean any federal felony so as to bring within the scope of the Bank Robbery Act miscellaneous federal felonies ranging from the sale of narcotics to white slave traffic.[6] But as indicated by Judge Frank in his dissenting opinion below, § 2(a) is not deprived of vitality if it is interpreted to exclude state felonies, and to include only those federal felonies which affect the banks[7] protected by the Act. That is in our opinion the correct construction.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning. United States v. Palmer, 3 Wheat. 610, 630; United States v. Smith, 5 Wheat. 153, 160; Harriman v. United States, 163 U. S. 140, 142. In this case, however, Congress has not punished an offense by its common law name. Moreover, at common law murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies. Wharton, Criminal Law (12th ed.), § 26. And see Bannon v. United States, 156 U. S. 464, 468. Since those miscellaneous crimes as a group do not suggest on their face that they constitute an appropriate base on which to build a federal criminal code for protection of national and insured banks, we will not readily infer that Congress used the word "felony" in its common law meaning. That conclusion is fortified by the further circumstance that Congress has defined numerous offenses in other federal penal statutes and has classified such offenses as felonies or misdemeanors according to the severity of the punishment. Criminal Code § 335, 18 U. S. C. § 541. Hence we need not look elsewhere for the meaning of the term. Cf. Reagan v. United States, 157 U. S. 301, 303. As stated in Adams v. McClung, 317 U. S. —, n. 2, the term "felony" is a "semantic survival which has been emptied of its historic content." Thus we conclude that the word "felony" as used in § 2(a) takes its meaning from federal statutes rather than from the common law.

Forgery at common law was a misdemeanor. Wharton, *supra*, § 861.

[7] One such instance would be violation of the National Stolen Property Act, 48 Stat. 794, 53 Stat. 1178, 18 U. S. C. § 413, especially 18 U. S. C. § 416.